IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl.M.C.No.3309/2005

# !	Rajeev Gupta	.....	Petitioner

VERSUS

$ ^	State & Ors.	.....	Respondents

Crl.M.C.No.3310/2005

# !	Rajeev Gupta	.....	Petitioner

VERSUS

$ ^	State & Ors.	.....	Respondents

Crl.M.C.No.3311/2005

# !	Rajeev Gupta	.....	Petitioner

VERSUS

$ ^	State & Ors.	.....	Respondents

Crl.M.C.No.3318/2005

# !	Rajeev Gupta	.....	Petitioner

VERSUS

$ ^	State & Ors.	.....	Respondents

Crl.M.C.No.3321/2005

# !	Rajeev Gupta	.....	Petitioner

VERSUS

$ State & Ors. ..... Respondents
^

Through: Mr.Rajat Aneja, Advocate for petitioner
Mr.Rakesh Makhija, Adv. for R-2
Mr.U.L.Watwani, Adv. for State

% RESERVED ON : 11.09.2007

DATE OF DECISION: 1.10.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. The question which falls for consideration in the present petition is: when the proceedings under Section 138 of the NI Act against a company is dropped, can it continue against the directors of that company.

2. All the above captioned 5 petitions have been filed by the Rajeev Gupta a director of the company M/s Sakura Seimitsu India Ltd.

3. Vide above captioned 5 petitions under Section 482 of the Code of Criminal Procedure, 1973, a challenge is laid to the common order dated 18.7.2005 passed by the learned Additional Sessions Judge whereby revision petitions filed by the petitioner

against the order dated 18.1.05 passed by the learned Metropolitan Magistrate refusing to drop proceedings under Section 138 of the NI Act against the petitioner were dismissed.

4. Briefly noted, relevant facts are that the respondent no.2, M/s Fortis Financial Ltd, filed 5 complaints under Section 138 of the NI Act against the company M/s Sakura Seimitsu India Ltd. In the said complaints, petitioner was impleaded as a co-accused on the ground that he is the director of the accused company and in-charge and responsible for the conduct of the business of the accused company.

5. The complaints contained the allegations that various cheques were issued on behalf of the accused company towards part discharge of its liability in favour of the complainant company and that said cheques were dishonoured by the drawee Bank on the ground of insufficiency of funds in the account. That the statutory notices of demand contemplated under Section 138 of the NI Act were issued to the accused company as well as to the petitioner demanding payment of the amounts covered by the cheques, but no amount was paid. Hence the complainant company alleged that both the accused are liable to be punished for the offence under Section 138 of the NI Act in respect of each of the cheques.

6. Taking cognizance of the said complaints, learned Metropolitan Magistrate summoned the accused company as also its

director i.e. the petitioner herein to face trial for an offence under Section 138 of the NI Act.

7. Meanwhile during pendency of the said complaints, pursuant to an order passed by the Allahabad High Court the accused company was wound up and an Official Liquidator was appointed to take charge of all the assets and properties of the accused company.

8. Thereafter an application was filed by the Official Liquidator before the learned Metropolitan Magistrate stating that in view of the provisions of Section 446 of the Indian Companies Act, 1956, the proceedings under Section 138 of the NI Act against the accused company cannot be continued without taking permission from the company court.

9. Vide order dated 3.11.2004, holding that the Section 446 of the Indian Companies Act, 1956 applies only to civil proceedings, learned Metropolitan Magistrate dismissed the application filed by the Official Liquidator.

10. The Official Liquidator chose not to appear before the learned Metropolitan Magistrate. An application was filed by the petitioner praying that the proceedings in question cannot be continued against him in the absence of the accused company. Vide order dated 18.1.05, the said application of the petitioner was dismissed.

11. Against the said order of the learned Metropolitan Magistrate, revision petitions were filed by the petitioner. Vide impugned order dated 18.7.05, the learned Additional Judge dismissed the said revision petitions.

12. Aggrieved by the said dismissal of the revision petition, present petitions have been preferred by the petitioners.

13. A two-fold submission has been urged in the petition.

(i) That the effect of order dated 18.7.05 passed by the learned Metropolitan Magistrate was that the proceedings against accused company were dropped. That this amounted to review of an earlier dated 18.1.05 wherein the learned Metropolitan Magistrate had directed the Official Liquidator to appear on behalf of the accused company. That in passing the order dated 18.7.95, the learned Metropolitan Magistrate has committed an illegality in view of the law declared by the Supreme Court in the decision reported as *Adalat Prasad v Roop Lal Jindal & Ors*, 2004 (4) RCR (Crl) 1 that the Magistrate has no power to review its order.

(ii) That if the complaint under Section 138 of the NI Act against the company has been dropped, the proceedings in the complaint cannot be continued qua its director i.e. the petitioner.

14. When matters came up for hearing on 11.09.2007, learned counsel for the complainant submitted that the complaint against the accused company be dropped on account of it being

ordered to be wound up. Order dated 11.09.07 reads as under:-

> "Present: Mr. Rajat Aneja, Adv. for the petitioner.
> Mr. Rakesh Mukhija, Adv. for respondent No.2.
> Mr. U.L.Watwani, Adv. for the State.
>
> +Crl.M.C.Nos. 3309/05, 3310/05, 3311/05, 3318/05 & 3321/05
>
> 1. Learned counsel for respondent No.2 states that the complainant is no longer interested in prosecuting the company impleaded as accused No.1 for the reason the company has been ordered to be wound up.
>
> 2. In view of the statement made by learned counsel for the complainant only submission urged by learned counsel for the petitioner is that having impleaded the company as an accused and once summoning orders are issued, it is not open to the complainant to withdraw the complaint against the company.
>
> 3. It is urged that as per law laid down by the Supreme Court in the decision reported as *Anil Handa Vs. Indian Acrylic Ltd.* 2000 (1) JCC 1 SC, sine qua non for holding a director of a company guilty would be to establish that the company had committed the offence and if the company is dropped as an accused it means that the company is discharged of the offence under Section 138 N.I.Act, meaning thereby that the director cannot be held liable for said offence.
>
> 4. Heard.
>
> 5. Reserved for judgment."

15. Thus the matter has to be considered in light of the order dated 11.09.07.

16. A co-accused has no locus standi to challenge the dropping of proceedings against the other co-accused. In the instant case, the party aggrieved by the order of the learned Metropolitan Magistrate of dropping against the accused company is the complainant company.

17. If the complaint is filed prior to the winding up orders passed against the company, and is withdrawn against the company after a winding up order is passed, such criminal proceedings can continue against the Directors. This legal position is settled by the Supreme Court in the decision reported as *Anil Hada v. Indian Acrylic Ltd*. 2000 Crl.L.J. 373.

18. In *Anil Hada*'s case, five complaints under Section 138 of the NI Act were filed against the accused company as also its 11 directors. Backdrop facts were noted in para 4 and 5 of the decision which reads as under:-

> "4. The magistrate took cognizance of the offence on each of the complaints and issued process against the accused. Objections were raised by the accused company on the premise that winding up proceedings have been ordered by the court on the accused company and hence no prosecution proceedings could be continued against the accused company. It appears that the magistrate had accepted the said contention and in respect of three complaints the magistrate ordered the complaint to remain in suspense against the accused company until leave is obtained from the Court concerned to continue with the prosecution proceedings. In respect of the remaining two

> complaints learned magistrate dropped further proceedings as against the accused company on the same premise.
>
> 5. It was in the aforesaid background that the present appellant, who is arraigned as second accused in all the complaints, moved the trial court for dropping the criminal prosecution against him also. The trial magistrate dismissed the petitions holding that prosecution against the directors of the company, who were in charge of the business of the company, could be maintained even without prosecuting the company itself. Revision petitions filed by the appellant in challenge of the aforesaid orders of the magistrate were dismissed by the learned single judge of the High Court as per the order, which is under challenge now."

19. It was held by the Supreme Court that an offender under Section 138 of the NI Act is the drawer of the cheque which alone would have been the offender thereunder, if the Act did not contain other provisions. Therefore, normally, in the case of a company incorporated under the Companies Act it is the company which would be the offender. However, by virtue of Section 141 of the NI Act, penal liability under Section 138 is cast upon other persons connected with the company. Therefore, those persons also become liable for penal action in addition to the company. It was further held that if the offence is committed by a company it can be punished only if the company is prosecuted. However, if instead of prosecuting the company, a payee opts to prosecute other persons falling within the description of Section 141 it is permissible for him to do so.

20. It is one thing to say that the sine qua non for conviction of the director of a company under Section 138 of the NI Act is to establish that the company had committed the offence and it is an altogether different thing to say that sine qua non for prosecution of the director of a company under Section 138 of the NI Act is to establish that the company had committed the offence. The Supreme Court in the *Anil Hada*'s decision (supra) has also made a distinction between these two as is evident from para 13 of the decision which reads as under:-

> "13. If the offence was committed by a Company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the Company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that offence was committed by the Company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

21. The Supreme Court also noted the provisions of Section 139 of the NI Act which draws a legal presumption in favour of holder, namely, to the effect that the holder of a cheque received the cheque of the nature referred under Section 138 of the NI Act in discharge, in whole or in part, of any debt or any other liability and held that such a presumption mentioned in this Section would operate not only against the drawer but against other persons who can be roped in by virtue of Section 141 of the Act. The liability of the company as well as Directors under Sections 138 and 141 of the Negotiable Instruments Act would remain if the cheque is presented after the winding up petition is filed and is pending but the orders of winding up have not been passed.

22. Supreme Court in para 21 of the decision summed up the discussion as under:-

> "We, therefore, hold that even if the prosecution proceedings against the company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of Sub-sections (1) and (2) of Section 141 of the Act. In the light of the aforesaid view we do not consider it necessary to deal with the remaining question whether winding up order of a company would render the company non-existent."

23. In the decision reported as *Bimal Kumar Nopani v State*

of UP 2006 Cri LJ 2611, the Allahabad High Court was considering a complaint under Section 138 of the NI Act against the Chairman/Managing Director of the company. The Chairman/Managing Director sought quashing on the ground that in the said complaint company was not made an accused. Noting the law laid down by the Supreme Court in *Anil Hada*'s case, the High Court observed as under:-

> "Thus it is clear that the person responsible for conduct and in -charge of the business of the company can be prosecuted without prosecution of the company itself. It is the choice of the complainant against whom he wants to proceed."

24. Taking note of law laid down by the Supreme Court in *Anil Hada*'s case, above captioned 5 petitions are dismissed.

25. No costs.

October 01 , 2007 PRADEEP NANDRAJOG, J.